



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**HIGH COURT CRIMINAL CASE NO. E004 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**EVANS ONONGI NYANGORI.....ACCUSED**

**JUDGMENT**

**Introduction**

1. The accused is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the night of 24<sup>th</sup> and 25<sup>th</sup> of December 2020 at Mabundu village in Bundo sub-location, Bogichora location in Nyamira South sub-county within Nyamira County, the accused murdered David Nyangori Bogonko.

2. The accused pleaded not guilty to the charge and the prosecution called eight witnesses to prove its case. In the ensuing trial, the accused was represented by Ms Ang'asa Advocate while the prosecution was led by Senior Prosecution Counsel Desmond Majale.

3. Briefly, the prosecution's case is that the genesis of this case was a demand by the accused to his father to be given land which he would sell to buy a motor cycle a demand that was vehemently resisted by his father, the deceased. Hellena Nyang'ate Nyamuori (PW1) testified that the accused was her last-born son; that on 24<sup>th</sup> December 2020 between 8.00 and 9.00pm she was in her house with the deceased and their grandson nicknamed Oponzi when the accused started shouting from his house about ten metres from theirs complaining that they had refused to give him land because they were apprehensive he would sell it to buy a motorcycle. PW1 testified that she heard the accused vow that he would finish someone that day. He kept pacing outside their house before finally going to their door. PW1 testified that when the accused knocked she told the deceased not to open but when the knocking became incessant he went and opened. PW1 testified that when the deceased opened the door the accused took a piece of timber which her husband (a carpenter) had kept near the door and hit the deceased with it a blow which sent the deceased sprawling on the floor. PW1 stated that she recognized the accused because the place was well lit by a lantern hanging on the wall. She narrated that the accused first hit the deceased on the forehead causing him to fall and when she tried to intervene he attacked her too and she fled through a window to seek help from the clan elder. She stated that before she fled the accused had hit the deceased on the face two times and that he had started to stomp on the deceased's belly while the deceased lay on the floor. PW1 testified that she did not find the clan elder and so she went back to the house only to find the accused was still beating his father. She stated that the deceased was bleeding profusely on the head and that the accused went and fetched water and poured it on him. She stated that she fled again and went back only after the accused left the house. She told this court that although she did her best to get help it was all in vain as villagers feared the accused and could not agree to go to their home. She further testified that when she went back she found the deceased leaning over the table and helped him to bed. She stated that he complained of pain on his back and that since she could not get help they retired to bed. The next morning, PW1 went and asked a teacher called Kennedy Oenga who had visited her other son Douglas to go and see her husband's condition. She explained that her other sons were not at home the previous evening. PW1 stated that she also told the accused to go and see what he had done to his father. Her sons Douglas and Erick reported the matter to the police and apprehended the accused and later handed him over to the police. The deceased succumbed to the injuries before he could be taken to hospital and before police officers arrived at the scene. His body was subsequently taken to the Nyamira County Hospital mortuary awaiting a post mortem. Dr. Ombati Timothy (PW6) testified that he performed the post mortem on 26<sup>th</sup> December, 2020. It was his evidence that the deceased had suffered multiple injuries both internally and externally and that after the examination he formed the opinion that the deceased died as a result of asphyxia secondary to lung injury due to high impact blunt trauma as a result of assault by a person known to him.

4. Corporal Kahindi Charo, Pw7 who is attached to Mabundu Police Post testified that on 25<sup>th</sup> December 2020, Erick Obani and James Morara took the accused who is their brother to the station. He stated that the accused was known to him as he was a boda boda rider. He testified that Erick Obani and James Morara reported that the accused had beaten their father with a plank of wood and that he was in critical condition. He stated that he advised them to leave the accused at the station and go back home to take their father to hospital but shortly afterwards they returned saying that their father had died. Pw7 stated that he booked the report and the accused as a suspect then proceeded to the scene with his colleague Erick Mbaye. Pw7 stated that they found an agitated and irate crowd surrounding the home of the deceased. The crowd wanted to lynch the accused but for the fact that he had been taken into police custody. Pw7 testified that he entered the house of

the deceased and when he confirmed that he was dead he immediately called the Officer in Charge of Nyamira Police Station and a team of officers was despatched to the scene. Pw7 stated that the accused denied he had assaulted his father. He (PW7) also disclosed that they had conducted a patrol near the deceased's home on the night of 24<sup>th</sup> December 2020 but they did not hear any fighting.

5. The Investigating Officer, Corporal John Pere (Pw8) testified that on 25<sup>th</sup> December 2020 at 8.30 a.m he went to the scene and found the deceased lying in bed with deep cut wounds on the head. He stated that IP Marucha, a Scenes of Crime Officer, took photographs of the scene and thereafter the body was taken to Nyamira County Hospital Mortuary. The accused was also taken to Nyamira Police Station. Pw8 stated that after conducting investigations, interviewing the witnesses and interrogating the accused he established that the accused murdered his father. He produced an exhibit memo form, the wooden plank, red plate and khanga in evidence as P.Exbs 3,4,5 and 6 and the photographs taken at the scene and certificate thereto as P.Exbs 7(a) and (b). Pw8 stated that the accused killed his father was because his father refused to cede a portion of land to him to sell so that he could buy a motor cycle as he could not otherwise afford one. He stated that the accused beat the deceased until he could no longer talk meaning that his intention was to kill him.

6. In his defence the accused vehemently denied intentionally killing his father and stated that he acted in self-defence. He stated that on the material day and time on his way home from work he went to a place and drank alcohol and then bought milk and bread to take to his house and also to his parents' house. He stated that after dropping his share in his own house he went and knocked on his parents' door and that his father asked who it was and when he identified himself and said that he had brought them bread his father retorted that he could go eat the bread with his wife. The accused stated that he persisted until his father opened the door. He stated that immediately after opening the door the deceased hit him on the head, neck and legs with a piece of timber. He stated that he wrested the timber from the deceased and hit him once. He stated that when the deceased fell down he took a jug of water and poured it on him as first aid. He then went to his house and slept. The accused was categorical that there was no other person in the deceased's house except his mother and the deceased. He stated that she did not raise an alarm and that the scuffle only lasted two minutes. He stated that the next morning, his mother woke him up and she told him to take his father to hospital as he was unwell. He stated that he went to their house and spoke to his father who was in stable condition and he asked him (the accused) to look for a motorcycle or vehicle to take him to hospital. The accused stated that he went to Mabundu Police Station and reported that his father had assaulted him inflicting upon him injuries on his head, back and neck but the police officer he found told him to go to hospital first as he was bleeding on the head. He stated that on his way out of the station he met his brothers Erick and Douglas who had gone there to see him so that they could take their father to hospital. The accused narrated that he gave Erick Kshs. 300 to take their father to hospital but later he heard that their father had died. He stated that he was then arrested and taken to Nyamira Police Station. The accused averred that the relationship between him and his father was cordial; that they had never argued and that in 2017, the deceased apportioned land to all his sons him included. He stated that he did not try to sell his portion which he used with no problem and that he was employed as a boda boda rider so he earned a living. He contended that as the lastborn in the family he used to take care of his parents and even built the house they resided in and that it was by bad luck that his father died.

#### **Final Submissions**

7. In her submissions Ms. Ang'asa Learned Advocate for the accused, stated that the accused who was 23 years old was married with two young children aged five and ten months. She submitted that the accused admitted that he had taken liquor on Christmas eve but he did not have mens rea or intention to kill his father. She submitted that when the accused went to his father's house he was unarmed and did not break the door; that his father opened the door willingly. Miss Angasa stated that the accused poured water on his father as first aid and when he established that his father was fine he went away. She stated that according to his statement, the accused also sustained injuries meaning that a fight had occurred between him and his father. She contended that the deceased's death was accidental and urged this court to be lenient to the accused taking into account that this was his first offence.

8. On his part, Mr. Majale submitted that it was apparent that the accused and his counsel were raising the defence of intoxication and self-defence. He discounted the same for lack of evidence well corroborated and overwhelming evidence adduced by the prosecution witness. Mr. Majale submitted that the accused's persistence until the deceased gave in and opened the door indicates that the accused's intention was way more than delivering milk and bread as he could have done that in the morning and that the accused had devised his defence to controvert malice aforethought. Counsel submitted that it was significant that instead of the accused taking the deceased to hospital the accused opted to go to the police station to make a report under the guise that he was the victim. Counsel contended that all the ingredients of the offence of murder had been proved beyond reasonable doubt and urged the court to find the accused guilty as charged and convict him.

#### **Determination**

9. The offence of murder is committed when a person of malice aforethought causes the death of another by an unlawful act or omission as stipulated in Section 203 of the Penal Code. In essence therefore the prosecution must prove the following elements beyond reasonable doubt;

- i. The death of deceased.*
- ii. That there was an unlawful act or omission which caused the death of the deceased.*
- iii. That the accused committed the unlawful act which caused the death of deceased.*
- iv. That the accused had malice aforethought.*

(See the case of **ANTHONY NDEGWA v REPUBLIC [2014] eKLR.**)

10. In this case there is no dispute that the deceased died. It is also not in dispute that the cause of his death were the injuries that were inflicted upon him by the accused on the night of 24<sup>th</sup> December, 2020. The accused himself admitted that he beat his father with a piece of timber sending him sprawling on the floor. The cause of death and the injuries sustained by the deceased are also consistent with an assault

leaving no doubt that death was by a human hand.

**11. The question for determination is whether the accused killed the deceased in self-defence or if this was a case of murder: whether the cause of death was by an unlawful act.**

The prosecution's case paints a more credible picture of the manner in which the deceased died. Pw1's evidence that the accused pushed the door open; pushed his father to the ground and struck him twice on the head with a wooden plank was corroborated by their grandson Pw2 who I am convinced was the only other person in the house at the material time. Photographs of the scene depict a room in disarray and suggests that the assault was committed by the accused for a relatively long period of time. This was also confirmed by PW1's evidence that she left the house twice to get help only to return and find the accused beating the deceased. Further, the injuries documented by Dr. Mokuia (Pw6) and the cause of death are consistent with the assault. Hellen Nyangate (Pw1) and Joseph Nyakundi (Pw2) testified that aside from hitting the deceased with the wooden plank, the accused stomped on his stomach/belly as he lay helpless on the floor. This explains the broken ribs that caused the lung injuries as explained by Dr. Mokuia (Pw6).

12. In his defence the accused seemed to raise the defences of self-defence and intoxication. In the case of **MWAURA v REPUBLIC [1980] KLR 127** the Court of appeal held that: -

***“The burden of proof remains on the State throughout to establish the case against the accused beyond reasonable doubt. Where the defence raises an issue such as provocation, alibi, self-defence, the burden of proof does not shift to the accused, instead the prosecution must negate that defence beyond reasonable doubt and the accused assumes no onus in respect of any such defence.”***

It is clear from the above finding that the accused does not bear the burden of proving the defence. My finding however is that the defences raised cannot hold. In the first place intoxication is only a defence where it is shown that the person raising it did not know what he was doing was wrong or did not know what he was doing and further that the state of intoxication was without his consent or that the intoxication caused him temporary insanity (**See Section 13 of the Penal Code**). None of the above circumstances were established in this case so the defence of intoxication does not avail the accused. It was evident from his evidence that he knew exactly what he was doing and the state of intoxication was of his own making.

13. As regards the defence of self-defence I find that the accused's version of what transpired is not convincing. The same is somewhat disjointed and unsupported by evidence. He stated that he hit his father only once in self-defence. However, the injuries he inflicted on the deceased were severe injuries which cannot be explained by a single blow. It is also unlikely that the deceased being advanced in age, over sixty years old he could have put up such a fight against the accused who was in his early twenties at the time. It is my finding that the deceased was easily overpowered, subdued and beaten without defending himself. PW1 testified that the accused assaulted the deceased for a considerable length of time which rules out that the accused hit the deceased once. Pouring water on the deceased was in my view a contemptuous act but was not an act of administering first aid as the accused alleged. There was overwhelming evidence that negates the accused's evidence that he was the victim and I find that the defence of self-defence does not therefore avail the accused. That evidence includes a dying declaration made by the deceased.

14. In regard to the dying declaration, James Morara (Pw3) testified that he spoke to the deceased the morning after the assault and that the deceased told him that he had been beaten by the accused. It is my finding that the statement made to James Morara (PW3) by the deceased amounted to a dying declaration. In the case of **Philip Nzaka Watu vs Republic (2016)eKLR** the Court of Appeal stated: -

***“Under section 33(a) of the Evidence Act, a dying declaration is admissible in evidence as an exception to the rule against admissibility of hearsay evidence. Under that provision, statements of admissible facts, oral or written, made by a person who is dead are admissible where the cause of his death is in question and those statements were made by him as to the cause of his death, or as to any of the circumstances of the transaction leading to his death. Such statements are admissible whether the person who made them was or was not expecting death when he made the statements. Clearly by reason of section 33 (a), there is no substance in the claim that a dying declaration constitutes inadmissible hearsay evidence.***

***Notwithstanding section 33(a) of the Evidence Act, courts have consistently held the view that evidence of a dying declaration must be admitted with caution because firstly, the dying declaration is not subject to the test of cross-examination and secondly, circumstances leading to the death of the deceased such as acts of violence, may have occasioned him confusion and surprise so as to render his perception questionable. While it is not a rule of law that a dying declaration must be corroborated to found a conviction, nevertheless the trial court must proceed with caution and to get the necessary assurance that a conviction founded on a death declaration is indeed safe. This Court expressed itself as follows in **CHOGE V. REPUBLIC (supra)**:***

***“The general principle on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful considerations to tell the truth. In Kenya, however the admissibility of dying declaration need not depend upon the declarant being, at the time of making it, in a hopeless expectation of eminent death. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”(Underlining mine)***

The dying declaration in this case was nevertheless corroborated by eye witness accounts and it is therefore admissible as evidence that makes the case against the accused person even stronger.

**15. What about malice aforethought?**

It was established by the investigating officer and stated by several witnesses that the accused's motive for killing the deceased was his refusal to allow the accused to sell land so as to buy a motorcycle. In his testimony the accused stated that he could not afford to buy his own motorcycle. His father (the deceased) however refused to cede land to him. His mother (PW1) attested to that fact and also to the fact that this angered the deceased. It is my finding that the manner of the assault, the fact that the accused continued beating and even stomping on the deceased's belly while he lay helpless on the floor and the nature of the injuries inflicted all point to an intention to kill the deceased or to cause him grievous harm. The above coupled with evidence that the accused had vowed to finish someone is proof that he acted of malice aforethought.

**16.** In light of the foregoing it is my finding that the assault was unlawful and of malice aforethought. The charge against the accused was proved beyond reasonable doubt. In the upshot, I find the accused guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 28TH DAY OF OCTOBER, 2021.**

**E.N. MAINA**

**JUDGE**